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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1186

GUSSIE JOFFE,

Petitioner,

v.

SIDNEY H. JOFFE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
COUNTER-STATEMENT OF THE CASE	1
REASONS FOR DENIAL OF WRIT	13
CONCLUSION	15

Cases Cited

Adam v. Senger, 303 U. S. 59	14
American Surety Company v. Baldwin, 287 U. S. 156 (1932)	15
Angel v. Bullington, 330 U. S. 183 (1946)	13
Barbour v. Barbour, 62 U. S. 582 (1858)	15
Berkman v. Ann Lewis Shops, 246 F. 2d 44 (2 Cir. 1957)	14
Bigelow v. Old Dominion Copper Mining and Smelting Co., 225 U. S. 111 (1912)	14
Coe v. Coe, 334 U. S. 378	14
Davis v. Davis, 305 U. S. 32 (1938)	14
Erie Railroad v. Tomkins, 304 U. S. 64 (1938)	13
Treinies v. Sunshine Mining Co., 308 U. S. 66 (1939)	15
General Radio Company v. Superior Electric Company, 293 F. 2d 949 (Ct. of App. 1st Cir. 1951)	15
Griffin v. McCoach, 313 U. S. 498 (1941)	14
Klaxon v. Stentor Electric Manufacturing Co., 313 U. S. 487 (1941)	13, 14

PAGE

Lea v. Lea, 18 N. J. 1 (Sup. Ct. 1955) 14

Mottolese v. Kaufman, 176 F. 2d 301 (2d Cir. 1949) .. 15

Sherman v. Kirshman, 369 F. 2d 886 (2 Cir. 1966) 14

Sherrer v. Sherrer, 334 U. S. 343 14

Shulman v. Miller, 191 F. Supp. 418 (E. D. Wisc. 1961) 14

State of Ohio ex rel Popovici v. Agler, 280 U. S. 379 .. 15

Williams v. State of North Carolina, 325 U. S. 226 ... 14

Text Cited

Restatement of Judgments (1942):

Sec. 42 ..... 14, 15

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BRIEF IN OPPOSITION

The respondent, Sidney H. Joffe, desires to file the following Brief in Opposition to the Petition for Writ of Certiorari filed by the Petitioner in the above matter.

Counter-Statement of the Case

Sidney H. Joffe was born in Paterson, New Jersey and has lived in New Jersey all of his 58 years of life. By profession he is a doctor and since the time he was licensed

to practice medicine, he has practiced medicine in the State of New Jersey solely, basically in the City of Paterson, as a partner together with his twin brother, Philip Joffe, until the death of his brother, and thereafter still continues in such practice alone. On occasions he maintained an office in his home located in neighboring communities and always in the State of New Jersey and never practiced medicine in any other State. At no time in his life has he ever domiciled in or resided in any other State than the State of New Jersey.

The parties were married on January 15, 1955 at Glen Rock, New Jersey. At the time of said ceremony, Sidney H. Joffe, was residing at 155 Rock Road, Glen Rock, New Jersey in a one family home owned by him. After the marriage, the petitioner, Gussie Joffe, came to live with the respondent, Sidney H. Joffe at his home at 155 Rock Road, Glen Rock, New Jersey. Subsequently, three children of a previous marriage of the respondent came to live with the parties at 155 Rock Road, Glen Rock, New Jersey. A child was born of this marriage and this child was born in the State of New Jersey, and also came to live at 155 Rock Road, Glen Rock, New Jersey.

They continued to live at 155 Rock Road, Glen Rock, New Jersey until November 1959 at which time the parties purchased, as tenants by the entirety, a one family house in Montclair, New Jersey. The parties, together with the three children of the previous marriage and the one child of this marriage, lived at the Montclair, New Jersey residence. He continued his practice in Paterson, New Jersey, continued his association with the hospital in Paterson, New Jersey, continued his Temple association in the State of New Jersey and at no time was he a member of any other religious Temple other than the one in New Jersey.

On May 1, 1962, the parties separated and the despondent moved to an apartment at Paterson, New Jersey. He

requested that the petitioner and the infant child of this marriage to live with him but she refused to do so and remained with the infant child at the Montclair, New Jersey residence. Thereafter, the petitioner moved almost all of the furniture out of the Montclair, New Jersey home against the wishes of the respondent without his knowledge and removed the child from the home in Montclair, New Jersey to an apartment in New York City, New York.

On June 21, 1962, the petitioner, Gussie Joffe, instituted an action for separation in the Supreme Court of New York, Index No. 30789-62. In her Complaint she alleged that she was a resident of the State of New York. Simultaneously with the institution of her suit for separation, she filed Affidavits seeking a Writ of Sequestration. In her Affidavits she stated that she was seeking the Writ of Sequestration since the defendant, in the New York action, the respondent in this action, Sidney H. Joffe, could not be served with process in the State of New York and that no provision for judgment, either interlocutory or final, could be made for the support of the petitioner and child unless the Order of Sequestration was granted. This was based upon the fact that Sidney H. Joffe was not domiciled in the State of New York since had he been so domiciled the long arm statute of New York would have applied and based upon said Affidavit a Writ of Sequestration issued and certain assets of the respondent, Sidney H. Joffe, in the State of New York were seized.

On July 13, 1962, an Order to Show Cause was issued in said New York action requiring the respondent herein to show cause why an Order should not be made granting temporary custody of the infant child to the petitioner herein, granting alimony and support for said infant child, *pendente lite,* requiring him to maintain the home in Montclair, New Jersey, and other relief. On July 13, 1962, a

copy of said Order to Show Cause, Affidavits and exhibits attached thereto, were served upon the respondent herein at his home, 759–11th Avenue, Paterson, New Jersey. He retained an attorney in the State of New York for the sole purpose of attacking the jurisdiction of the action instituted in the New York court by way of special appearance in accordanee with the rules of New York and not to enter a general appearance. The said attorney, in accordance with the rules of New York courts then in effect, filed a Notice of Motion by way of special appearance attacking the jurisdiction of the New York court, on the grounds that Gussie Joffe, the plaintiff in such action, was not a resident of the State of New York. Such Notice of Motion was filed on August 14, 1962.

On August 16, 1962, the respondent herein, Sidney H. Joffe, filed a Complaint in the Superior Court of New Jersey, Chancery Division, seeking in the First Count custody of the infant child and seeking in the Second Count an accounting for furniture removed by the petitioner in this cause. The Summons and Complaint were served upon the said Gussie Joffe personally in the State of New Jersey by the Sheriff of the County of Passaic and State of New Jersey in accordance with the rules of the New Jersey courts. On August 27, 1962, Sidney H. Joffe filed a verified Petition in said New Jersey action seeking an Order of injunction against the said Gussie Joffe. Based upon said Petition, an Order to Show Cause with restraints issued on August 27, 1962. A day or two before the time for answer to expire, at the request of the attorney for Gussie Joffe, attorney for Sidney H. Joffe in the New Jersey action signed a Stipulation extending time to file an Answer.

In the meantime, on September 12, 1962, Judge Klein of the New York Supreme Court rendered an opinion on

the Notice of Motion to strike the Complaint brought by Sidney H. Joffe in the New York action by way of special appearance. His decision held that Gussie Joffe's Affidavit established a *prima facie* residence on her behalf in the State of New York and that such *prima facie* proof coupled with a levy made on the defendant's assets in the State of New York were sufficient to give the New York court jurisdiction for the purpose of denying the motion. No finding was made by Judge Klein either that Sidney H. Joffe was domiciled in the State of New Jersey or that he was personally subject to the jurisdiction of that court. The decision gave Sidney H. Joffe the right to file an Answer to the Order to Show Cause and the Complaint. Sidney H. Joffe neither filed any such Answer nor Affidavits and did not thereafter, in any way, participate in the proceedings.

On September 20, 1962, Gussie Joffe, defendant in the New Jersey action, filed with the New Jersey Superior Court, in the case then pending, a verified Petition to strike the Complaint of Sidney H. Joffe in such New Jersey action on the grounds that the New Jersey court did not have jurisdiction. Based upon said Petition, an Order to Show Cause issued September 20, 1962 and returnable October 5, 1962 which Order to Show Cause restrained Sidney H. Joffe from proceeding with his cause of action and from proceeding upon the Order to Show Cause issued by the court dated August 27, 1962, and until the further order of the court. On September 21, 1962, the Honorable Vito A. Concilio, Judge of the Superior Court, entered an Order in said New Jersey action restraining Gussie Joffe from proceeding in any manner with her cause of action instituted by her in the State of New York, until the further order of the court and determination of the motions. A copy of said Order for temporary restraint was served upon Gussie Joffe personally. Said latter Order of Re-

straint has never been vacated by the court and still remains in full force and effect.

Sidney H. Joffe filed an Answering Affidavit on October 3, 1962 in answer to the verified Petition of Gussie Joffe to strike the New Jersey Complaint. Said motion to dismiss filed by the said Gussie Joffe in the New Jersey court was argued and the court ordered the matter continued until November 2, 1962. An Order of Continuance to that effect was entered by the court which continued the restraints contained in the Order to Show Cause of September 20, 1962 obtained by Gussie Joffe and the Order of Restraint contained in the court's Order of September 21, 1962 obtained by Sidney H. Joffe and provided that Sidney H. Joffe be given leave to file an Amendment to the Complaint adding a Third Count seeking to permanently enjoin the said Gussie Joffe from proceeding in the State of New York.

Thereafter, the said return day of Orders to Show Cause and Notice of Motion were adjourned at the request of the said Gussie Joffe and the matter was set down for the taking of oral testimony upon the motion filed by the said Gussie Joffe on January 16, 1963. All restraints were continued and an Order permitting the said Sidney H. Joffe to have visitation with the infant child who is in the physical possession of Gussie Joffe, was entered.

On or about December 24, 1962, Gussie Joffe, in violation of the restraints imposed upon her in the New Jersey action, filed a Notice of Motion in the New York action seeking to have a declaration made that Sidney H. Joffe had appeared generally in said New York action. The Notice of Motion was returnable January 8, 1963. Sidney H. Joffe filed a verified Petition in the New Jersey action seeking to hold the said Gussie Joffe in contempt based upon the above facts on January 4, 1963. An Order to

Show Cause issued on said verified Petition and contained restraints restraining her from proceeding in the New York action and requiring her to vacate any Orders which she might obtain. No application was made to dissolve the restraints despite permission contained in the Order to Show Cause to do so and despite the restraints issued, Gussie Joffe proceeded to have an Order entered in the New York court declaring that Sidney H. Joffe had appeared generally in the New York action. The said Sidney H. Joffe made no appearance, either personally or through attorney on said motion in the New York court nor did he participate therein in any manner.

The said Gussie Joffe then filed a Supplementary Affidavit to her Petition to dismiss the Complaint in the New Jersey court and alleged as additional grounds the Order of Judge Backer in the New York court entered on January 11, 1963 declaring that Sidney H. Joffe had entered a general appearance in New York as an additional reason why the courts of New Jersey did not have jurisdiction. The matter of taking of testimony on the Petition to strike the New Jersey Complaint was partially heard and continued to an additional date. The said Gussie Joffe, through her attorneys in the New Jersey action, delayed the taking of such additional testimony by repeated requests for adjournments. In the meantime she continued to move her cause of action in the State of New York despite the restraints imposed upon her by the courts of New Jersey in the suit in which she had been served personally. Each time she served a paper on Sidney H. Joffe of her planned move in New York, applications were made in the New Jersey Superior Court to restrain her and hold her in contempt for violating the Orders of the New Jersey Superior Court. Each time the restraints were granted and the applications to hold her in contempt were carried until disposition of her Petition to strike Sidney

H. Joffe's Complaint in the New Jersey Superior Court. Included among such actions taken by her, was to obtain judgment for arrearages on the *pendente lite* order of the New York Supreme Court.

The continued date of taking of testimony in the New Jersey Superior Court on Gussie Joffe's Amended Petition to strike the Complaint filed by Sidney H. Joffe in such court was held on November 15, 1963. The said Gussie Joffe was represented by counsel at such hearings and porticipated fully in said hearings. Testimony not being completed on that date, the matter was continued to December 19, 1963 to take further testimony.

During that interval, Gussie Joffe again proceeded with her New York action contrary to the restraints. She caused to be served a Notice for settlement of proposed findings of fact, conclusions of law and judgment of separation. Once again Sidney H. Joffe filed a Petition in the New Jersey Superior Court seeking to restrain her from proceeding in the New York court and to hold her in contempt. An Order to Show Cause issued on his application which contained restraints restraining her from proceeding. Despite the restraints imposed upon her, Gussie Joffe proceeded and obtained a judgment for separation in the Supreme Court of the State of New York on December 2, 1963. Sidney H. Joffe did not participiate in any manner, either personally or through counsel, in such New York proceedings.

Immediately upon obtaining the judgment for separation in the New York Supreme Court, Gussie Joffe moved in the New Jersey Superior Court to declare that the judgment for separation obtained in the New York Supreme Court was entitled to full faith and credit in New Jersey as a valid *in personam* judgment against Sidney H. Joffe and amended her Petition to strike the plaintiff's Complaint based upon said additional grounds.

On December 19, 1963 the testimony on her petition to strike the New Jersey Complaint, including her allegations concerning the Order of Judge Backer declaring that Sidney H. Joffe had entered a general appearance in the State of New York and her allegation that the Judgment of separation obtained in the State of New York was entitled to full faith and credit in New Jersey as a valid *in personam* judgment against Sidney H. Joffe. Gussie Joffe appeared through counsel and participated fully in said hearing. At the conclusion of the testimony, the trial Judge requested Gussie Joffe to submit an exemplified copy of the New York Supreme Court proceeding. Her counsel said that she would do so immediately and the trial Judge reserved decision pending the submission of such record.

During the interval and while the trial Judge in the New Jersey Superior Court was awaiting the submission of the record as requested, Gussie Joffe commenced the instant action in the United State District Court for the District of New Jersey on February 4, 1964 seeking a money judgment against Sidney H. Joffe based on the judgments for arrearages obtained by her in the New York Supreme Court. On February 25, 1964 she filed an Amended Complaint adding a Second Count seeking a declaration that the Judgment of separation obtained by her was entitled to full faith and credit as an *in personam* judgment against Sidney H. Joffe. Based upon her Complaint, an Order to Show Cause was issued by Judge Augelli directing that Sidney H. Joffe show cause why he should not be restrained from proceeding in the New Jersey courts until the United States District Court for the District of New Jersey should determine whether the Judgment obtained by her in the New York Supreme Court was entitled to full faith and credit. Said Order to Show Cause contained an *ad interim* restraint against the defendant, Sidney H. Joffe, from proceeding in the New Jersey Superior Court.

Sidney H. Joffe, through his attorneys, moved to dismiss the Complaint filed by Gussie Joffe in the United States District Court or in the alternative, to stay proceedings in the United States District Court for the District of New Jersey until determination of the suit pending in the State of New Jersey. Sidney H. Joffe filed an Affidavit in answer to the Order to Show Cause obtained by Gussie Joffe.

On March 9, 1964, the Honorable Anthony T. Augelli, Judge of the United States District Court for the District of New Jersey, granted the application of Sidney H. Joffe to vacate and dismiss the restraints obtained by Gussie Joffe and denied her application for temporary injunction restraining the said Sidney H. Joffe from proceeding in the Superior Court of New Jersey. An Order to such effect was entered by the Honorable Anthony T. Augelli on May 18, 1964.

At the call of the motion brought by Sidney H. Joffe in the United States District Court for the District of New Jersey, it was agreed that a Consent Order would be submitted staying all proceedings pending in the United States District Court for the District of New Jersey, pending decisions and determinations of proceedings that were appealed therefrom in the suit in the New Jersey Superior Court, Chancery Division, under Docket No. M-6660-61. An Order to such effect was entered on May 18th, 1964.

On August 24, 1964 the Hon. Vito A. Concilio of the New Jersey Superior Court rendered his decision upon the Amended Petition filed by Gussie Joffe to strike the Complaint filed by Sidney H. Joffe. He found from the evidence adduced and produced that Sidney H. Joffe was and had been domiciled in the State of New Jersey, that the infant child was and had been domiciled in the State of New Jersey all of his life until removed to the State of New York

by Gussie Joffe without the permission of Sidney H. Joffe, that as a matter of fact Sidney H. Joffe had not entered a general appearance in the State of New York and had not litigated the issues in the State of New York; and that the various Orders and Judgments of the New York Supreme Court that Sidney H. Joffe was domiciled therein or had entered a general appearance were not entitled to full faith and credit in New Jersey nor was the Judgment of Separation obtained by Gussie Joffe entitled to full faith and credit in New Jersey as in personam judgment against Sidney H. Joffe. An Order to such effect was entered on September 8, 1964. Said Order remains in full force and effect today. Said Order of September 8, 1964 above referred to in the New Jersey Superior Court referred all outstanding contempt applications and Motions to the Hon. David A. Nimmo, Judge of the Superior Court of New Jersey, for appropriate action. One additional application for contempt was referred to the Hon. Vincent C. Duffy sitting in the New Jersey Superior Court for action.

A hearing was held on the contempt application before the Hon. Vincent C. Duffy in which Gussie Joffe participated through counsel. An Order of Contempt was entered by the Hon. Vincent C. Duffy in the New Jersey Superior Court on October 20, 1964. Said Order of Contempt punished the said Gussie Joffe and contained, among other things, an Order requiring Gussie Joffe to vacate the Orders and Judgments obtained by her in the New York action.

A hearing was held on the contempt applications referred to the Hon. David A. Nimmo in the New Jersey Superior Court in which Gussie Joffe participated through counsel. An Order of Contempt was entered by the Hon. David A. Nimmo on November 12, 1964. Said Order of Contempt required, among other things, that Gussie Joffe vacate the Orders and Judgments obtained by her in the New York action.

Gussie Joffe appealed from said Orders of Contempt to the New Jersey Superior Court, Appellate Division, which affirmed the Orders. She then Petitioned the Supreme Court of the State of New Jersey for Certification and Certification was granted. Thereafter the matter was appealed to the Supreme Court of the State of New Jersey and was affirmed by the Supreme Court of the State of New Jersey.

After the entry of the Order by the Hon. Vito A. Concilio on September 9, 1964, Gussie Joffe filed her Answer in the New Jersey action. Hearings, after numerous delays because of requests for adjournment and change of counsel by Gussie Joffe, were held over approximately 12 days and the parties are awaiting decision in said matter.

In the interim Sidney H. Joffe instituted an action for divorce in the New Jersey Superior Court, Chancery Division, under Docket No. M-695-63 against Gussie Joffe. Gussie Joffe was served personally in the State of New York. She entered no appearance nor filed any Answer. A Judgment *Nisi* of Divorce was granted Sidney H. Joffe on September 27, 1966 which Judgment became final on December 27, 1966. No appeal was taken from said Judgment and it remains in full force and effect.

On October 26, 1966 Gussie Joffe filed a Motion in the United States District Court for the District of New Jersey to restrain the defendant, Sidney H. Joffe, from proceeding in the New Jersey Courts, for leave to file a further Amended Complaint, for Summary Judgment on Count One of her original Complaint and Count Two of her Amended Complaint, and sought a temporary restraining Order ex parte. On October 20, 1966 the Hon. Vincent T. Augelli denied her application for temporary restraining Order ex parte and said Gussie Joffe filed a Notice of Appeal therefrom to the United States Court of Appeals.

On November 2, 1966 Gussie Joffe filed an Amended Motion in the said United States District Court seeking to restrain Sidney H. Joffe from proceeding in the New Jersey Superior Court and for Summary Judgment as to Count One of her original Complaint and for leave to file an Amendment to her Complaint. Sidney H. Joffe filed his Answering Affidavit at length. On November 16, 1966 the Hon. Vincent T. Augelli ordered that the Motion of the said Gussie Joffe be denied and ordered her Complaint dismissed. Subsequently and without further argument, the Hon. Vincent T. Augelli revised his decision to be a denial of the Motion of Gussie Joffe for restraint and for Summary Judgment and Amendment and staying all further proceedings until final determination of the proceedings in the New Jersey courts. Gussie Joffe appealed from said Order to the United States Court of Appeals.

Both Orders of the Hon. Vincent T. Augelli were affirmed by the United States Court of Appeals.

Reasons for Denial of Writ

The Respondent urges that the Petition for Writ of Certorari in this matter be denied since the decisions of the Courts below are in accordance with the well established rules and procedures of the Federal Courts, and raises no new or novel questions of such importance as to warrant the granting of a Writ of Certiorari. The primary basis of our contention are the cases which hold that a Federal District Court sitting in a State in a case based upon diversity of citizenship cannot enforce rights created in another State they would not be enforced in the State in which it sits. A Federal Court sitting in a case involving diversity of citizenship enforces the State law and policy of the State in which it sits. *Angel* v. *Bullington,* 330 U. S. 183 (1946); *Erie Railroad* v. *Tomkins,* 304 U. S. 64 (1938); *Klaxon* v.

Stentor Electric Manufacturing Co., 313 U. S. 487 (1941); *Griffin* v. *McCoach*, 313 U. S. 498 (1941). The State of New Jersey has declared that the New York actions are not entitled to full faith and credit which declaration remains in full force and effect. This is based upon the Federal decisions that hold that a decree based upon a finding of domicile is entitled to full faith and credit only if it is made after an actual contest and litigation of that issue or if in fact the domicile actually exists, *Davis* v. *Davis*, 305 U. S. 32 (1938); *Sherrer* v. *Sherrer*, 334 U. S. 343; *Coe* v. *Coe*, 334 U. S. 378. But neither the Federal Courts nor the State Courts can be foreclosed from examining and making full inquiry into the basis of the claim of jurisdiction upon which a foreign judgment is predicated, whether it be by inquiry as to the actual domicile of the plaintiff, fraud of the plaintiff, or jurisdiction over the defendant personally. The mere statement of or technicalities of the pleading are not the determining factor. The determining factor is whether there actually was jurisdiction over the defendant or whether there actually was domicile in the foreign jurisdiction. Both the Federal Courts in each State may make such inquiry. *Williams* v. *State of North Carolina*, 325 U. S. 226; *Adam* v. *Senger*, 303 U. S. 59; *Shulman* v. *Miller*, 191 F. Sup. 418 (E. D. Wisc. 1961); *Bigelow* v. *Old Dominion Copper Mining and Smelting Co.*, 225 U. S. 111 (1912); *Berkman* v. *Ann Lewis Shops*, 246 F. Sec. 44 (Sec. Cir. 1957); *Sherman* v. *Kirshman*, 369 F. Sec. 886 (Sec. Cir. 1966); *Lea* v. *Lea*, 18 N. J. 1 (Sup. Ct. 1955).

In addition thereto the question was fully litigated in the New Jersey Courts in which both parties participated both personally and through counsel. Where in two successive actions between the parties inconsistent Judgments are rendered, the Judgment of the second action is controlling in a third action between the parties. Restatement of

Judgments, Section 42 (1942); *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66 (1939); *American Surety Company* v. *Baldwin*, 287 U. S. 156 (1932). Whether they were entitled to full faith and credit was litigated at length with both parties being present in the New Jersey Superior Court and its Judgment is controlling.

As further reason for the denial of the Petition for Writ of Certification we urge that the action of the United States District Court was in conformance with the law which the Federal Courts have held that equity will always intervene to prevent a multiplicity of suits and the economical functioning of the Court and duplication of judicial time. *General Radio Company* v. *Superior Electric Company*, 293 F. Sec. 949 (Ct. of Appeals, 1st Cir. 1951); *Mottolese* v. *Kaufman*, 176 F. Sec. 301 (2d Cir. 1949); and the determination by the Federal Courts that where the basic question involves domestic relations, determination thereof is best left to the State Court, *Barbour* v. *Barbour*, 62 U. S. 582 (1858); *State of Ohio ex rel Popovici* v. *Agler*, 280 U. S. 379.

CONCLUSION

For the reasons above expressed the application for Writ of Certiorari to review the Judgment below should be denied.

Respectfully submitted,

J. Mortimer Rubenstein
Counsel for Respondent.

Dated: April 10th, 1968.